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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THEDA FUNG, Plaintiff and Appellant, v. SUSANA MANCIA et. al., Defendants and Respondents.	A153727 (San Francisco County Super. Ct. No. CGC-17-556612)

Plaintiff and appellant Theda Fung (plaintiff) obtained an entry of default after defendants and respondents Susana Mancia and MGM Investments 2015, LLC (Mancia and MGM) failed to file a responsive pleading to her complaint. Mancia and MGM subsequently obtained an order granting relief from default under Code of Civil Procedure section 473, subdivision (b).[1] Plaintiff appeals. We dismiss the appeal as having been taken from a nonappealable order.

I. BACKGROUND

On January 20, 2017, plaintiff filed a complaint naming Mancia and MGM, amongst others, as defendants.[2] The complaint included causes of action for negligence,

[1] Further statutory references are to the Code of Civil Procedure.

[2] Also named as defendants were Susana Mancia aka Susy Garcia aka Susana Garcia aka Susy Garcia Mancia as an agent of Terra Nova Real Estate Services and as an owner/agent of Law Office/Defensa Latina, Law Office/Defensa Latina, Terra Nova Real Estate Services, Shideh Rostami individually and as an agent/owner of Terra Nova Real

elder financial abuse, breach of fiduciary duty, constructive fraud, actual fraud and constructively fraudulent transfers. Plaintiff was represented by John S. Rueppel of O'Neil & Rueppel, LLP.

Mancia and MGM were personally served with the complaint on March 16, 2017. They did not file an answer or other pleading in reply. On April 26, 2017, their attorney, Victor H. Toscano, sent the clerk of the superior court an email requesting a hearing date and reservation number for a motion to change venue, on behalf of defendants Mancia and MGM. On April 28, 2017, the clerk sent an email to attorney Toscano stating that the hearing date reservation was for July 26, 2017.

On May 4, 2017, attorney Rueppel sent a letter to attorney Toscano stating he had given an extension until April 24, 2017 to file a responsive pleading, and indicating he would file a request for entry of default against Toscano's clients on May 8, "2018" (apparently, he meant "2017"), unless Toscano filed a responsive pleading by then. On May 5, 2017, Toscano sent an email to Rueppel indicating a motion for change of venue had been filed and mailed and a July 26 hearing date had been obtained.

On May 26, 2017, plaintiff requested the entry of default against Mancia and MGM and defaults were entered.[3] On July 25, 2017, attorney Toscano sent attorney Rueppel a proposed stipulation to set aside the defaults, accompanied by a letter explaining that a motion to change venue had been submitted but for some reason was not placed on the court's calendar, and that an answer was not filed because counsel had believed the motion was pending. Rueppel responded on July 27, 2017, stating that he and his client declined to so stipulate because the motion to change venue had not been served and no proof of service was filed. On August 15, 2017, Rueppel again wrote to

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Estate Services and Wells Fargo & Company. These defendants are not parties to the appeal.

[3] The request for entry of default forms do not reflect that the court clerk actually entered defaults as requested, but the Register of Actions notes that defaults were entered as to Mancia and MGM. Plaintiff was entitled to entry of default on the date it was requested so long as there was no responsive pleading by Mancia and MGM on file. (*Goddard v. Pollack* (1974) 37 Cal.App.3d 137, 142.)

Toscano, indicating his client remained unwilling to stipulate to setting the defaults aside. "I gather from your letter that you failed to complete the process of filing your motion. This still does not explain your failure to file a proof of service or otherwise ensure the motion was served."

On November 30, 2017, attorney Toscano filed "Exhibits 1 to 4 in Support of Motion to Set Aside Default." Exhibit 1 was Toscano's email correspondence with the superior court clerk about obtaining a hearing date for the change of venue motion; Exhibit 2 was a motion to change venue without a file stamp; Exhibit 3 was the May 2017 correspondence between attorneys Toscano and Rueppel; and Exhibit 4 was the July 2017 correspondence between attorneys Toscano and Rueppel. A proposed answer on behalf of Mancia and MGM was also separately filed on November 30, 2017 as Exhibit 5.

Plaintiff filed opposition to the motion to set aside the defaults on January 2, 2018. She argued that the motion had been brought beyond the statutorily specified period of six months (182 days) after the defaults were entered and should be denied as untimely. She also argued that even if Mancia and MGM filed the motion within the statutorily specified period, it was not filed within a reasonable time as required. The opposition noted that Mancia and MGM had failed to file a notice of motion, motion or memorandum of points and authorities, in violation of rule 3.1112 of the California Rules of Court.

On January 12, 2018, Mancia and MGM filed reply papers that included an attorney declaration of fault executed by Toscano stating he had originally filed a motion to set aside the defaults on November 27, 2017, the last day for doing so. He presented a copy of the motion to vacate that had been submitted. (See § 437, subd. (b).) The motion to vacate had been based on the argument that Toscano had not answered on behalf of Mancia and MGM because he erroneously believed a motion to change venue had been

successfully filed and that no answer was required.[4] It was accompanied by a declaration of attorney fault by Toscano, which also stated that the delay in filing the motion was due to his computer being hacked during the last four months. The reply papers contained as exhibits the emails between Toscano and his attorney service (One Legal) indicating that his papers filed on November 27, 2017 had been "partially accepted" by the court and were being returned so that the correct department could be placed on the motion.

The trial court granted the motion to vacate the default in an order dated February 2, 2018. The court ordered that Mancia and MGM answer by February 8, 2018, that Toscano pay for the fees and costs incurred by plaintiff in opposing the motion, and that Toscano remit $1,000 to the State Bar Client Security Fund by February 22, 2018.

II. DISCUSSION

A. *Appealability*

This appeal was taken from the February 2, 2018 order setting aside the default. The notice of appeal, filed February 13, 2018, states that this was an "order after judgment under Code of Civil Procedure, § 904.1(a)(2)," but in fact no default judgment was ever entered in this case. Although issues relating to the granting of a defendant's motion to set aside the default may be raised in an appeal from the (default) judgment, an order vacating a default is not itself appealable. (*Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1154; *Velicescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1522; see *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1137.)

This appeal was therefore taken from a nonappealable order. Appellant does not argue otherwise, despite having been given a chance to do so. This Court issued a request for supplemental briefing regarding the appealability of the challenged order on January 22, 2019. Appellant has not filed a supplemental brief.

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[4] The filing of a change of venue motion is not an appearance preventing entry of default. (*W.A. Rose Co. v. Municipal Court for Oakland-Piedmont Judicial Dist.* (1959) 176 Cal.App.2d 67, 71-72; see § 396b, subd. (a).)

B. *The Appeal Should Not Be Treated as a Writ*

An appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate if there are unusual circumstances. (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) Appellant has not asked us to do so, and in any event we would decline. Plaintiff would not prevail on the merits, and there are no unusual circumstances that warrant treating the appeal as a writ.

Since 1988, section 473, subdivision (b) has provided for both mandatory and discretionary relief from judgments, defaults and dismissals. (*Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 723; *Luri v. Greewald* (2003) 107 Cal.App.4th 1119, 1124.) Under the mandatory relief provision, which is at issue here, "Notwithstanding any other requirements of this section, the court *shall, whenever an application for relief is made no more than six months after entry of judgment,* is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (§ 473, subd. (b), italics added.)

The time for bringing a motion for mandatory relief is "no more than six months after entry of judgment." (§ 473, subd. (b).) Thus, "if no default judgment has been entered, there appears to be no time limit on a motion for relief based on attorney fault." (Weil & Brown, Civ. Proc. Before Trial, Vol. 1, p. 5-90, 5:305.2.) Here, no default judgment has been entered, and appellant's primary argument that the motion to vacate was untimely under the statute lacks merit.

Nor could plaintiff prevail on her argument that the trial court erred in granting the motion because it was not in proper form. Given that the period for filing a motion for

mandatory relief from default had not yet expired, the trial court did not abuse its discretion in considering the reply papers, which were adequate themselves to support an application for mandatory relief under section 473, subdivision (b). (See *Poway Unified School Dist. v. Chow* (1995) 39 Cal.App.4th 1478, 1483-1485 [trial court retained discretion to grant party leave to file belated motion].)

Plaintiff's arguments would fail on the merits and we will not treat this appeal as a writ petition in order to reach them.

III. DISPOSITION

The appeal is dismissed. Costs to respondent.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BURNS, J.

(A138978)